



FOIP FOLIO

OIPC 2009–2010 ANNUAL REPORT



On June 30, 2010, **Gary Dickson**, the Saskatchewan Information and Privacy Commissioner, issued his 2009–2010 Annual Report.

In his Annual Report, Dickson stated, “Saskatchewan in 2010 must confront a troubling access and privacy deficit.” He described the deficit as “the gap between significantly increasing

public demand for access and privacy services and the frozen or shrinking resources available to meet that public demand.” He listed 12 features of the access and privacy deficit including a failure by elected and non-elected leaders in Saskatchewan public bodies to emphasize to their employees the importance of compliance with access and privacy laws. He said, “What this means is that Saskatchewan residents may be denied the benefit of the access and privacy rights defined by our laws. It means that

some public bodies and trustees will not be held accountable when they fail to provide the remedies guaranteed by our laws.”

Dickson also noted that recent steps by the Saskatchewan Government to facilitate trade with British Columbia and Alberta may be handicapped by the fact that this province does not have a private sector privacy law to simplify privacy rules for small and medium sized businesses.

The Commissioner also expressed concern about a number of arbitration decisions in which the dismissal of health care workers for egregious breaches of privacy was overturned. In a News Release announcing the 2009–2010 Annual Report, Dickson stated, “These decisions reflect a worrisome lack of awareness of the electronic health record for all Saskatchewan residents and the critical need to ensure public confidence in this initiative.”

The full document is available under the *Annual Reports* tab on our website: www.oipc.sk.ca.

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SASKATCHEWAN ACCESS, PRIVACY, SECURITY AND RECORDS MANAGEMENT FORUM—"MAKING CONNECTIONS" COMING TO REGINA SEPTEMBER 28—29

The Access and Privacy Branch, Ministry of Justice and Attorney General for Saskatchewan would like to invite you to this year's Saskatchewan Access, Privacy, Security and Records Management Forum 2010- Making Connections.

The goal of this year's event is to demonstrate the connectivity between these disciplines, provide a forum for you to make your own connections with colleagues in other fields or organizations, and help to improve the performance of each discipline within all public bodies.

This conference will be ideal for government institutions, local authorities, health trustees and anyone interested in learning more about freedom of information, privacy, security and management of records. The conference is to be held in Regina at the Regina Inn, on September 28-29, 2010.

Recently, the conference agenda has been updated with many exciting inter-jurisdictional and cross discipline panel discussions and case studies, such as:

- Provincial Information and Privacy Commissioner Panel by **Frank Work**, Q.C., Information and Privacy Commissioner of Alberta; **Gary Dickson**, Q.C., Information and Privacy Commissioner of Saskatchewan and **Irene Hamilton**, Ombudsman of Manitoba.

- *Putting it into Practice: Privacy and Security for Healthcare Providers Implementing Electronic Medical Records* by **Nick Giesinger**, Director of Strategic Services at the Saskatchewan Ministry of Health.
- *Making Connections through Enterprise Information Management - What Does This Really Mean?* by **Dr. Mark Vale**, Chief Information and Privacy Officer of Ontario.
- *The ABCs of Access Impact Assessments* by **Sharon Polsky**, Chair of CAPAPA and President of AMINA Consulting Corporation.

For more details on the conference and agenda, please visit: <http://www.verney.ca/sk2010/agenda.php>

Lastly, please be reminded that the **Super Saver Special of \$299.00** will end on **August 6, 2010**. If you wish to register for the event, you may do so online at <http://www.verney.ca/sk2010> or by calling 1-866-814-8317. If you have questions about the conference, please contact Crystal Wong at Verney Conference Management by telephone at (613) 226-8317 or by email at cwong@verney.ca.

Mark the date! September



NEW INFORMATION AND PRIVACY COMMISSIONER FOR NEW BRUNSWICK

We will certainly miss **Bernard Richard**, New Brunswick Ombudsman, who skilfully and effectively provided the access to information and privacy oversight as well as a host of other duties under five different statutes.

We are pleased to welcome to Canada's access and privacy community, **Anne Bertrand**, who has just

been appointed New Brunswick's very first Information and Privacy Commissioner.





ONTARIO COMMISSIONER ADDRESSES STOLEN LAPTOP BREACH

Ontario Information and Privacy Commissioner, **Ann Cavoukian**, has issued Order HO-008 under the *Personal Health Information Protection Act*. This dealt with the theft of a laptop from the car of a nurse which contained records of approximately 20,000 patients. The data on the laptop was not encrypted. In fact, the custodian organization the nurse worked for had a system to encrypt information on its laptop computers but the encryption software failed to properly deploy and the error message had been ignored by those responsible for ensuring encryption had been done. This problem was compounded by the nurse who removed the laptop from her employer's premises and then left it unattended on the front seat of her car over the course of a weekend. These actions violated a number of the custodian's policies and procedures.

Commissioner Cavoukian found that the custodian's information practices at the time of this incident were inadequate and the agents of the custodian did not comply with those information practices that were in place. The custodian also failed to ensure that the records of personal health information (phi) in its custody or under its control were transferred in a secure manner.

The custodian sent out 705 letters to patients where there appeared to be current contact information. Where the contact information appeared to be outdated, the custodian placed an electronic flag on the file for each affected individual and individual letters were added to the related patient charts. This step was taken for 19,337 patients. Should these patients return for treatment, they will be advised to contact the Privacy Office, which in turn, will advise them of the incident and provide them with their written notice. In addition, the custodian issued a news release, also posted to their website, to advise the public of the breach. The full report is available at www.ipc.on.ca.

To avoid this type of breach in our province, we remind all Saskatchewan trustees that the OIPC has created a number of tools available on our website including: *Best Practices - Mobile Device Security*.



WHO NEEDS TO KNOW WHY AN EMPLOYEE IS LEAVING A JOB?

An interesting case recently dealt with by the Alberta Information and Privacy Commissioner, **Frank Work**, under that province's *Personal Information Protection Act* (PIPA) considered a memo that the employer sent to all of its employees. This memo

discussed why an individual was leaving and included information that the Commissioner found violated PIPA. Order P2009-012 is available at www.oipc.ab.ca.

BRITISH COLUMBIA OIPC NIXES COLLECTION OF SIN NUMBERS BY MANUFACTURED HOME PARK

A couple interested in living at a manufactured home park filled out a tenancy application form that required personal information such as social insurance numbers and driver's licence numbers. Subsequently, a thief broke into the park office and took the couple's completed forms, which had been

left in plain sight on the manager's desk. After the park management was reminded by the BC OIPC, it agreed to start locking up their files overnight and to modify their forms to collect less personal information. The Commissioner's office stated that

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"Landlords have no right to require prospective tenants to provide their social insurance numbers, which are intended for very limited uses, primarily related to income tax collection..."

You can view the full report, P10-06-MS, at www.oipc.bc.ca.

NEW DIRECTIVE ON PRIVACY IMPACT ASSESSMENT (PIA) FROM TREASURY BOARD

Federal government institutions have a new set of policies with respect to PIAs. The April 1, 2010 instrument is simply entitled *Directive on Privacy Impact Assessment* and is available at <http://www.sct.gc.ca/pol/doc-eng.aspx?evttou=X&id=18308§ion=text>.

The apparent purpose is to more carefully measure the privacy risk involved in undertaking a PIA and to recognize that conducting a PIA can be a "resource intensive exercise". This involves considering the PIA "within an institution's broader risk management framework".

DOES YOUR ORGANIZATION HAVE A RECORD RETENTION AND DESTRUCTION POLICY?

A best practice for all Saskatchewan government institutions, local authorities and health information trustees is to develop and implement a comprehensive record retention and destruction policy. Among other benefits, such a practice prevents the serious problems our office has encountered in the last several years with abandoned patient files when physicians move from the province or retire. Not only will such a policy make it easier for you to find and retrieve key records, but it will also ensure that you are compliant with the various contractual, legal, accounting, and other requirements that deal with the retention of records. Some considerations for your organization include:

- Ensure you have everyone necessary involved. You will need to consider advice from your lawyer, your accountant, information technology and Human Resource experts.
- Identify all the legal and regulatory requirements. This would include FOIP, LA FOIP, HIPA and, *The Archives Act, 2004*.
- Prepare a written policy.

- Consider a procedure for a 'litigation freeze'. Provide for protection of documents relevant to current or anticipated litigation or access request/privacy complaint under FOIP, LA FOIP or HIPA.
- Ensure you account for 'off site' records. Remember that your responsibility extends to records under your organization's control even if not in your possession.
- Implement and enforce the policy. The policy will be valueless if you don't train your staff and do periodic audits to ensure ongoing compliance.





WHAT WILL AMENDMENTS TO THE PERSONAL INFORMATION PROTECTION AND ELECTRONIC DOCUMENTS ACT (PIPEDA) MEAN FOR SASKATCHEWAN BUSINESSES?



As noted in our June 2010 FOIP FOLIO (page 5), there will be substantial changes to PIPEDA that will affect almost all businesses in Saskatchewan that collect, use and disclose personal information in the course of commercial activity. PIPEDA does not apply to public sector organizations in our

province, does not apply to personal information of employees (unless federal works or undertaking) and does not apply to our provincial Crown corporations. Some further changes that we want to bring to your attention:

- Business contact information is exempt when it is collected, used or disclosed only for business communication.
- In response to insurance company representations,

there is now a generous provision for non-consensual collection, use and disclosure of the statements from witnesses for purposes of dealing with insurance claims.

- Although no explicit reference to 'work product', there is an exception to consent for collection, use or disclosure of personal information "produced by the individual in the course of their employment, business or profession" but only where the collection, use or disclosure is "consistent with the purposes for which the information was produced."
- There will be a new provision to accommodate information sharing for purposes of mergers and acquisitions. This important feature existed in the British Columbia and Alberta *Personal Information Protection Act* (PIPA) laws but was not a feature of PIPEDA.
- The former provision of approved "investigative bodies" has been scrapped and replaced with a purpose based general provision.
- A new amendment clarifies what is meant by "lawful authority".

SUPREME COURT OF CANADA: RIGHT TO ACCESS IS CHARTER RIGHT

The Supreme Court has affirmed that as Canadians we have a Charter right to access government records, but only if the information is needed to promote "meaningful public discussion on matters of public interest".

It is disappointing that the court did not declare a general right of access to information although this modest step does affirm a constitutional basis for the access to information. What was being considered was the Ontario Criminal Lawyers' Association request under that province's FOIP Act for a 300 page

Ontario Provincial Police review of how local police forces handled the investigation of a Toronto mobster. The case was referred back to the Ontario Information and Privacy Commissioner to review whether the government properly exercised its discretion to withhold all or some of the report on the basis of the Ontario law enforcement exemption. The full text decision is available at [Ontario \(Public Safety and Security\) v. Criminal Lawyers' Association, \[2010\] S.C.C. No. 23.](#)



MORE ON CLOUD COMPUTING

In our February/March 2010 FOIP FOLIO (page 5) we alerted readers to a major public consultation undertaken by the Privacy Commissioner of Canada on 'cloud computing'. The Ontario Information and Privacy Commissioner has now released a white paper that outlines a data protection scheme for data that enters the cloud. The paper – *Modelling Cloud Computing Architecture Without Compromising Privacy: A Privacy by Design Approach* is available at www.ipc.on.ca.

By cloud computing, we are speaking of data processing, data retention and data presentation services that are decoupled from a client's location. The client simply accesses a shared pool of configurable computing resources on an on-demand

basis. It allows a client organization to take a 'pay-as-you-go' approach for as much or as little of the resource as your organization may require. This allows an organization to save money and allows a stronger focus on its core business. The use of cloud computing by any Saskatchewan government institution, local authority or trustee raises very important privacy considerations and will require extremely careful attention when any cloud

computing contract is considered. Will the data still be under the control of the Saskatchewan organization for purposes of FOIP, LA FOIP or HIPA? Will the data be adequately protected? Would cloud computing impede the citizen's right of access to information? How does the Saskatchewan organization control secondary use or unauthorized access to its own data when it is clearly no longer in its possession or custody? Is our 18 year old FOIP Act up to the task of addressing and overseeing cloud computing? Clearly, this is something not contemplated when the model for our FOIP Act was developed about 30 years ago. Interestingly, these are many of the same kind of questions that have arisen in

the context of electronic health records. The electronic health record is still very much a work in progress. Given our current legislation, we would strongly caution any government institution, local authority or trustee organization that is contemplating the use of cloud computing to not proceed without first doing a very thorough Privacy Impact Assessment. PIA forms are available at our website, www.oipc.sk.ca under the *Resources* tab.



MADRID PRIVACY STANDARD

Brandon Evenson, a student at Osgood Hall Law School, has produced an interesting analysis of the draft international standard for the protection of privacy and personal data adopted at the 31st International Data and Privacy Commissioners Conference in Madrid, Spain. As Mr. Evenson points out, the Madrid Standard overlaps to a

significant extent with the Global Privacy Standard drafted in 2005 but is written with a view to become a binding international instrument. This piece is available at <http://iposgoode.ca/2010/01/madrid-privacy-standard-still-in-its-infancy/>. This initiative is not likely to have any kind of binding effect in

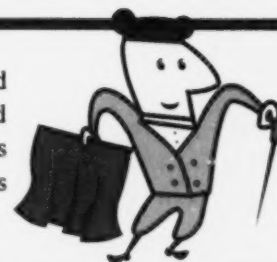
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Saskatchewan any time soon. On the other hand, given the proliferation of privacy laws, instruments and tools and the explosion of interest in privacy issues, it makes sense for organizations to be

mindful of the Madrid standard and associated international developments to see where privacy is headed.



IMPROPER DESTRUCTION OF DOCUMENTS CAN BE A BIG PROBLEM FOR AN ORGANIZATION



The Information Commissioner of Canada, **Suzanne Legault**, in March 2010 completed her investigation with respect to the application of section 67.1 of the *Access to*

Information Act (ATIA), and concluded that records responsive to an access request were destroyed and that certain individuals were counselled to destroy records during the course of the processing of this request. This involved the National Gallery of Canada and allegations that a number of e-mails that had been requested under ATIA had been destroyed.

She referred the matter to the Attorney General of Canada for prosecution under section 67.1. The Commissioner's findings are available at www.infocom.gc.ca/eng/inv-inv_not-inv-sum-som-inv-not_sum_2009-2010_1.aspx.

The counterpart in the SK FOIP is section 68(3) "Any person who (a) without lawful justification or excuse wilfully obstructs, hinders or resists the commissioner or any other person in the exercise of the powers, performance of the duties or the carrying out of the functions of the commissioner or other person pursuant to this Act;... is guilty of an offence and liable on summary conviction to a fine of not more than \$1,000, to imprisonment for not more than three months or to both fine and imprisonment".

CLARIFYING WHAT IS AND IS NOT PERSONAL INFORMATION FOR PURPOSES OF FOIP

The Office of the Ontario Information and Privacy Commissioner has recently issued two Orders that clarify the meaning of personal information. These two decisions also clarify work product that is not captured by the definition of "personal information" and discuss the notion of what qualifies as a benefit for an employee. The Orders are [MO-2519](#) (Township of Madawaska Valley) and [MO-2520](#)

(City of Vaughan) and are available at www.ipc.on.ca.



Right to Know Week is September 27—October 1, 2010



REMINDER—SUBMIT YOUR NOMINATIONS FOR CULLITON AWARD!



The Right to Know (RTK) steering committee is again seeking nominations for the *Chief Justice E.M. Culliton Right to Know Award*. The intent of the award is to celebrate and to recognize leadership in promoting open and accountable government.

- Creativity in building public awareness of access to information;
- Excellence in orientation of, and service training in, employee access to information responsibilities; and/or
- Innovation in the development of tools to promote or facilitate access to information

To be eligible, the body must be a Saskatchewan government institution (provincial government Ministry, Crown corporation, board, commission or agency) or a local authority (regional health authority, municipality, library, school, university or college).

The **deadline** for nominations is **September 15, 2010** and can be self-initiated or third party. Nominations should include a letter of nomination (up to 1,000 words), and samples of materials relevant to the nomination (testimonials or other material).

The nominee should be an agency that has demonstrated some or all of the following qualities:

- Leadership in promoting public access to the agency's information;

The award will be presented during Right to Know Week which will be held September 27-October 1, 2010. Nominations can be sent to the Right to Know Steering Committee, c/o #503, 1801 Hamilton Street, Regina, SK S4P 4B4 or fax (306) 798-1603 or email shickling@oipc.sk.ca

MARK YOUR CALENDAR!

September 19—20, 2010: *CBA National Privacy and Access Law Conference, "Privacy and Access Rights in the Age of Technology: the State of Canadians' Information Rights in 2010 and Beyond"*, Ottawa, Ontario. For more information, visit http://www.cba.org/pd/details.aspx?id=NA_PRV10

September 28—29, 2010: *Saskatchewan Access, Privacy, Security and Records Management Forum 2010—"Making Connections"*, Regina Inn, Regina, Saskatchewan. For more information, visit www.verney.ca/sk2010

November 2—3, 2010: *PIPA Conference 2010—"Getting Through the Privacy Jungle—How to See the Forest...and the Trees"*. For more information, visit <http://www.privacyconference.ca/agenda.php>

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